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No. 84-1076

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TRANSCONTINENTAL GAS PIPE LINE CORPORATION
Appellant,

v.

THE STATE OIL AND GAS BOARD OF MISSISSIPPI AND COASTAL EXPLORATION, INC., *et al*
Appellees.

On Appeal from the Supreme Court of Mississippi

MOTION OF APPELLANT FOR LEAVE TO FILE RESPONSE TO SUPPLEMENTAL BRIEF OF COASTAL EXPLORATION, INC. AND RESPONSE BRIEF

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December 27, 1985

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MOTION OF APPELLANT FOR LEAVE TO FILE RESPONSE TO SUPPLEMENTAL BRIEF OF COASTAL EXPLORATION, INC.

Transcontinental Gas Pipe Line Corporation (Transco) moves the Court for leave to respond to the presentation and characterization of a certain intervening matter by an Appellee, Coastal Exploration, Inc. (Coastal), and in support thereof would show as follows:

1. On December 9, 1985, Coastal filed its Motion to File Supplemental Brief After Argument. Said motion was granted on December 16, 1985. Coastal's motion and accompanying Supplemental Brief seek to bring to the Court's attention an Initial Decision of

an Administrative Law Judge regarding matters at issue in this cause. Coastal's motion and brief also argue that the Initial Decision supports its position in the instant case.

2. Transco desires to respond to Coastal's Supplemental Brief in order to demonstrate that the Initial Decision strengthens Transco's argument that Mississippi's Rule 48 conflicts with the exercise of federal jurisdiction and is therefore preempted. Transco's Reply to Coastal's Supplemental Brief is attached hereto.

WHEREFORE, PREMISES CONSIDERED, Transco moves the Court for leave to file its Response to Coastal's Supplemental Brief.

This the 27th day of December, 1985.

Respectfully submitted,

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BRIEF OF APPELLANT IN RESPONSE TO SUPPLEMENTAL BRIEF OF COASTAL EXPLORATION, INC.

The Supplemental Brief of Coastal Exploration, Inc. (Coastal) brings to the attention of the Court the Initial Decision of an Administrative Law Judge which addresses whether or not Transcontinental Gas Pipe Line Corporation (Transco) can flow through to its customers certain costs resulting from Mississippi's Ratable Take Order, Statewide Rule 48. Transco would show that the Initial Decision demonstrates precisely the inevitable conflict between Mississippi's

Rule 48 and the jurisdiction of the FERC as previously discussed.[1]

1. The Initial Decision arose in the context of Transco's semi-annual purchased gas adjustment filing (PGA) with the FERC.[2] In its PGA, Transco sought to include in its resales rates the gas costs[3] resulting from, among other things, the enforcement of Mississippi's Rule 48. The Initial Decision was rendered after objection by the FERC staff and the Associated Gas Distributors to the prudence of Transco's purchases in Mississippi which were made in compliance with the State Oil & Gas Board Order and subsequent state court decisions.

Because Mississippi's action forced Transco to incur additional gas costs, Transco sought to pass through

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[1]See Transco Br. at 30-34, Transco Reply Br. at 5-7, FERC Br. at 17-26, as well as the statements quoted from the presentation of Mr. Feit, FERC Solicitor, at oral argument. See Coastal's Supp. Br. at 2.

[2]Although the intervening matter brought to the attention of the Court by Coastal serves to confirm the jurisdictional conflict, it is an initial decision of an Administrative Law Judge, not a "FERC opinion" as characterized by Coastal. See Coastal's Supp. Br. at 3. The decision is subject to initial review and rehearing by the FERC and possible judicial review thereafter. 15 U.S.C. § 717r; 18 C.F.R. §§ 385.711-13. Thus the decision submitted by Coastal does not constitute action by the FERC and is not final. Indeed, Judge Megan, the administrative judge, expressly made his findings "subject to review by this Commission [the FERC]." Coastal's Supp. Br., App. at 10a.

[3]These costs include the additional gas costs arising from purchases of non-contract gas at "market price" made in order to comply with Rule 48 in lieu of of purchases under gas contracts which provide for prices below "market price." See Reply for Appellant at 4. See also Transco Br. at 30.

these costs in its PGA filing before the FERC. This places the FERC in a dilemma—adjust its regulations to accomodate State laws or penalize Transco for obeying Rule 48. In granting the requested pass through, the Administrative Law Judge, Judge Megan, stated that Transco "should not be placed in jeopardy for obeying an order of a duly constituted authority while that party undertakes successive appeals seeking to overturn an adverse decision." Coastal's Supp. Br., App. at 7a. Further, Judge Megan held that Transco, in his view, "is entitled, and is indeed required, to follow the decisions and orders of the Mississippi authorities until and unless they be overturned by the Supreme Court of the United States." *Id.* at 8a. Thus Mississippi has directly affected the cost of gas to consumers in other states, heretofore the exclusive province of the FERC.

2. FERC's dilemma is precisely that portrayed by Transco and the FERC in their briefs. See note 1, *supra.* As noted therein, the FERC clearly should have jurisdiction and authority to determine the prudence of Transco's costs. However, there is a clear conflict between Rule 48 and the FERC's exclusive jurisdiction over those gas costs. As the FERC stated in its brief:

> Thus, a practice that the Commission, under the statute, might have found to be an "abuse" meriting a denial of pass through if done at the pipeline's own initiative—the purchase of expensive deregulated gas when alternative lower cost supplies were available—is a required practice by order of the state.

FERC Br. at 21-22. See also Transcript of Oral Argument at 17-18, Coastal's Supp. Br. at 2. Judge

Megan has addressed this conflict by ruling that he had no choice but to accommodate Rule 48.

3. The Initial Decision places this case in virtually an identical position to *Maryland v. Louisiana*, 451 U.S. 725 (1981). *See* Transco Br. at 21, 30-31 and 33. Therein, Louisiana had imposed a tax on offshore gas which passed through the state. The Court found that the effect of the tax was to interfere with FERC's authority over transportation and sale of gas, specifically its authority over the allocation of costs. 451 U.S. at 746 and 749. The Court characterized Louisiana's action as a "substantial usurpation" of FERC authority. *Id.* at 749.

It is important to remember that it was not actual interference with an FERC ruling which was involved in *Maryland v. Louisiana.* Indeed, the FERC had passed the tax costs through to the consumer, pending judicial review of the law in question. *Id.* at 737 n. 13, 751 n. 25. Rather, the prohibited interference occurred between the downstream effect of the state enactment and the FERC's authority or jurisdiction over those downstream consequences:

> Under the Gas Act, determining pipeline and producer costs is the task of the FERC in the first instance, subject to judicial review. Hence, the further hearings contemplated by the Special Master to determine whether and how processing costs are to be allocated are as inappropriate as Louisiana's effort to preempt those decisions by a statute directing that processing costs be passed on to the ultimate consumer. *Even if the FERC ultimately determined that such expenses should be passed on in toto, this kind of decision-making is within the jurisdiction of the FERC; and the*

> *Louisiana statute, like the state Commission's order in Northern Natural Gas, supra, is inconsistent with the federal scheme and must give way. At the very least, there is an "imminent possibility of collision," ibid. The FERC need not adjust its ruling to accommodate the Louisiana statute. To the contrary, the state may not trespass on the authority of the federal agency.* As we see it, plaintiffs are entitled to judgment on the pleadings that § 1303(c) is invalid under the Supremacy Clause.

Id. at 751-52 (emphasis added).

The action of Judge Megan in adjusting his ruling to accommodate Mississippi's Rule 48 strongly supports Transco's position in this case. It clearly demonstrates the existence of the same type of conflict which prompted reversal in *Maryland v. Louisiana.* Just as in *Maryland v. Louisiana,* reversal of the offending state law is also required in this case.

This the 27th day of December, 1985.

Respectfully submitted,

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